A **KAMIL AZMAN ABDUL RAZAK & ORS v. AMANAH RAYA BHD & ORS**

FEDERAL COURT, PUTRAJAYA
RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
B ALIZATUL KHAIR OSMAN FCJ
ROHANA YUSUF FCJ
MOHD ZAWAWI SALLEH FCJ
[CIVIL APPEAL NO: 02(f)-110-10-2017(W)]
30 APRIL 2019

C

CIVIL PROCEDURE: *Judgments and orders – Consent judgment – Performance of clauses – Whether performance of one condition subject to pre-condition – Whether court entitled to release one party of its obligation without releasing other party – Whether ss. 53 and 55 of Contracts Act 1950 applicable*

D

CIVIL PROCEDURE: *Judgments and orders – Consent judgment – Variation, setting aside or nullifying valid consent order – Payment of loan facilities – Claim for – Whether there was pre-condition to repayment of loan sums – Whether repayment of loans conditional upon parties entering into joint venture agreement – One party refuses to perform an agreement – Whether counter party may treat* E *himself as discharged – Whether obligation of one party under a clause could be discharged on good reasons – Whether court could release one party from performing a clause of consent judgment – Whether court could set aside or nullify part of valid consent order*

F ***TRUSTS:*** *Constructive trust – Property – Purchase of – Property purchased for sole purpose of joint venture – Non-materialisation of joint venture – Whether property purchased held in constructive trust for both parties – Claim for refund of purchase consideration – Whether parties ordered to make refunds of purchase consideration – Whether principles of constructive trust applicable*

G The appeal herein emanated from two appeals before the Court of Appeal involving three suits filed at the High Court. Pursuant to a trust deed dated 13 October 2006, one Abdul Razak created the ARSM Trust and appointed Amanah Raya Berhad ('ARB') as its trustee. On 19 October 2007 and 19 September 2007 respectively, Amanah Raya Capital Sdn Bhd ('ARC') granted a loan of RM5,000,000 each, individually to Abdul Razak and one H Kamil Azman pursuant to two sets of agreements known as moneylending agreement (secured loan). Amongst the securities provided for the loan was the guarantee agreement executed by Kamil Azman, to personally guarantee on demand against all sums of money owed by Abdul Razak to ARC. It was later agreed between Abdul Razak, Kamil Azman and ARB in the year 2008 I that greater profits would be obtained by way of development of one of the trust properties held under PT 287B. For that purpose, an adjoining land held under Lot 1396A was acquired by the plaintiffs through Excel Beat Sdn Bhd

('Excel Beat') with a view of undertaking a joint venture development. Both PT 287B and Lot 1396A were then sold to Amanah Raya Development Sdn Bhd ('ARD') at a price consideration of RM2,895,000 and RM2,905,000 respectively. In October 2009, Abdul Razak, Kamil Azman, Kalsombi and Excel Beat ('the plaintiffs') sued ARB, ARC, Amanah Raya Investment Management Sdn Bhd ('ARIM') and ARD ('the defendants') in Suit 375, for breach of trust and fiduciary duties on their part including various breaches of duties by ARB as trustee. A consent judgment was recorded on 28 July 2010 between ARB, ARD, ARC, ARIM with Abdul Razak, Kamil Azman, Kalsombi, and Excel Beat over Suit 375. In the consent judgment, it was agreed by ARC that the period of loan granted to Abdul Razak and Kamil Azman would be extended and the mode of repayment was spelled out in various clauses. It was also agreed that a joint venture agreement ('JV agreement') was to be entered into between Abdul Razak and Kamil Azman or their nominees, with ARD or its nominees. However, nothing materialised from the consent judgment. The main dispute centred on the issue that the plaintiffs had nominated ARSM Trust as their nominee which was not agreed upon by ARB and its group. ARB could not agree to have ARSM as a nominee to contract the JV agreement because ARSM was not a legal entity and could not be a party to the JV agreement and it was also not a party to the consent judgment. Two years after the consent judgment was recorded, the same group of plaintiffs filed Suit 650 against ARB, ARC and ARD seeking, *inter alia,* specific performance of the JV agreement and a declaration that the defendants had acted in breach of trust. The defendants counterclaimed in the same Suit 650 seeking, *inter alia*, to be released from any obligation to enter into the JV agreement and for an order that ARD be refunded from the purchase consideration of the two pieces of land. Subsequently, ARC filed Suit 1471 against Abdul Razak for the repayment of the loan facilities as well as Kamil Azman for loan repayment together with the guaranteed loan to Abdul Razak. Suit 1471 was heard together with Suit 650 at the High Court. In Suit 650, the claim of the plaintiffs was dismissed and the two items of the counterclaim by the defendants were allowed. The refund of purchase consideration was also allowed. The plaintiffs appealed to the Court of Appeal against this decision. The claim of ARC for the repayment of the loans in Suit 1471 was allowed by the High Court, where Abdul Razak and Kamil Azman were ordered to repay the loan amount to ARC together with interest. The plaintiffs appealed against this decision in Appeal 541. After hearing both appeals together, the Court of Appeal affirmed the decisions of the High Court in both Suit 650 and Suit 1471. The appellants in this appeal were Kamil Azman, Kalsombi and Excel Beat while the respondents were ARB, ARD and ARC. At the leave application before this court, the appellants proposed certain questions to be determined (i) where a consent order consists of mutual obligations and promises, was the court entitled to release one party of its obligation without releasing the other party; (ii) whether a court may effectively set aside or nullify a part of a valid consent order particularly in the absence of

A allegations or findings of fraud, misrepresentation, coercion or undue influence; and (iii) where property was purchased by one party for the sole purpose of a joint venture with a second party, and the joint venture did not materialise, was the property so purchased held in constructive trust for both parties.

Held (dismissing appeal with costs)

B **Per Rohana Yusuf FCJ delivering the judgment of the court:**

(1) By the consent judgment, it was agreed that the loan repayment would be extended from its original due date. It also provided for the eventuality of payment remaining outstanding. The consent judgment did not say that the repayment of loans would be made from the C proceeds of the joint venture. There was nothing from all the clauses that could be construed to say that the performance of one condition (such as repayment of loan) may be subject to a pre-condition that the JV agreement must first be in place. The clauses in the consent judgment were not dependent on each other. This court was not able to appreciate D that the performance of the clauses in the consent judgment depicted a particular order of performance so as to enable the court to invoke and apply s. 53 or to employ the common sense order of precedence as envisaged by s. 55 of the Contracts Act 1950. (paras 30-32)

E **(2)** The loans were granted to both Abdul Razak and Kamil Azman and the loan documents disclosed that they were granted individually to each of them. There was no reason to conclude that the loan payment was dependent on the conclusion of the JV agreement. Kamil Azman had given his personal guarantee to ARC against all the sums owed by Abdul Razak by way of a guarantee agreement, and he was correctly held to F be liable to the claim of the respondents. Hence, the contention of the appellants that the obligations of the two borrowers Abdul Razak and Kamil Azman to pay ARC was contingent upon the performance of any obligation by ARC pursuant to the consent judgment, in particular the JV agreement, was bereft of any merit. There was no pre-condition to G the repayment of the loan sums. Both the Court of Appeal and the High Court had arrived at the correct conclusions that the repayment of loans was not conditional upon the parties entering into the JV agreement. (paras 33, 34 & 41)

H **(3)** The deadline agreed for the JV agreement to be finalised was 1 August 2010. The appellants were dragging the discussions and the conclusion of the agreement and insisted in nominating ARSM Trust as their nominee despite objections by ARB. By 8 June 2011, all discussions had ceased which led to Suit 650 being filed by the appellants. The appellants were clearly indolent and unwilling to enter into the JV I agreement which formed the basis of the High Court granting the declaration sought by ARD. The High Court was correct to release the ARD from performing cl. 9 of the consent judgment but such order could not amount to a setting aside order or a variation of that part of

the consent judgment. The declaration granted was in accord with the trite legal principle that where one party refuses to perform an agreement, the counterparty may treat himself as discharged. The High Court therefore did not set aside cl. 9 or vary the same but had simply declared that the respondents' obligation under that clause was discharged on good reasons. (paras 48 & 49)

(4) ARD had admitted purchasing the lands at market price and thereby sought the refund of the purchase consideration, in the event the court found that the commercial activities undertaken by the respondents' group of companies was *ultra vires* the Public Trust Corporation Act 1995 as alleged. The issue on *ultra vires* was however not proceeded with by the appellants at the Court of Appeal. The fair Order stated that the counterclaim for the refund of purchase consideration paid by ARD was allowed, and the plaintiffs were ordered to refund ARD with the same together with interest thereon. In the circumstances, the fair Order had to be given cognisance. Following this, the High Court allowed the counterclaim of the respondents for the refund, and the appellants were ordered to refund the purchase consideration with interest. Despite ordering refund of the purchase consideration, the JC had failed to make a consequential order, for the lands to be returned to the appellants. Thus, this failure invited this court's appellate intervention. Instead of pursuing with the argument on the applicability of the principles of constructive trust, what the appellants ought to have sought was for this consequential order to be made. Thus, the submission on constructive trust was of no relevance. (paras 55, 56, 58 & 59)

Bahasa Malaysia *Headnotes*

Rayuan ini timbul daripada dua rayuan di hadapan Mahkamah Rayuan melibatkan tiga guaman yang difailkan di Mahkamah Tinggi. Menurut satu surat ikatan amanah bertarikh 13 Oktober 2006, Abdul Razak telah mewujudkan Amanah ARSM dan melantik Amanah Raya Berhad ('ARB') sebagai pemegang amanah. Pada 19 Oktober 2007 dan 19 September 2007, Amanah Raya Capital Sdn Bhd ('ARC') memberikan pinjaman RM5,000,000 setiap satu, secara individu kepada Abdul Razak dan Kamil Azman menurut dua set perjanjian yang dikenali sebagai perjanjian pembiayaan wang (pinjaman bercagar). Antara sekuriti yang disediakan untuk pinjaman adalah perjanjian jaminan yang dilaksanakan oleh Kamil Azman, untuk secara peribadi menjaminkan permintaan terhadap semua jumlah wang yang dihutang oleh Abdul Razak kepada ARC. Kemudiannya, dipersetujui antara Abdul Razak, Kamil Azman dan ARB dalam tahun 2008 bahawa keuntungan yang lebih besar akan diperolehi melalui pembangunan salah satu daripada hartanah amanah yang dipegang bawah PT 287B. Untuk tujuan itu, tanah bersebelahan yang dipegang bawah Lot 1396A diperoleh oleh plaintif-plaintif melalui Excel Beat Sdn Bhd ('Excel Beat') dengan tujuan menjalankan pembangunan usaha sama. Kedua-dua PT 287B dan Lot 1396A kemudiannya dijual kepada Amanah Raya Development Sdn Bhd ('ARD')

dengan balasan belian RM2,895,000 dan RM2,905,000. Pada Oktober 2009, Abdul Razak, Kamil Azman, Kalsombi dan Excel Beat ('plaintif-plaintif') menyaman ARB, ARC, Amanah Raya Investment Management Sdn Bhd ('ARIM') dan ARD ('defendan-defendan') dalam Guaman 375, atas pelanggaran amanah dan kewajipan-kewajipan fidusiari pada pihak mereka termasuk beberapa pelanggaran kewajipan oleh ARB sebagai pemegang amanah. Satu penghakiman persetujuan direkodkan pada 28 Julai 2010 antara ARB, ARD, ARC, ARIM dengan Abdul Razak, Kamil, Kalsombi dan Excel Beat ke atas Guaman 375. Dalam penghakiman persetujuan tersebut, dipersetujui oleh ARC bahawa tempoh pinjaman yang diberikan kepada Abdul Razak dan Kamil Azman akan dilanjutkan dan mod bayaran balik dinyatakan dalam berbagai-bagai klausa. Juga dipersetujui satu perjanjian usaha sama ('perjanjian US') akan dimeterai antara Abdul Razak dan Kamil Azman atau calon-calon mereka, dengan ARD atau calon-calonnya. Walau bagaimanapun, tiada apa-apa menjadi kenyataan daripada persetujuan penghakiman itu. Perbalahan utama adalah mengenai isu bahawa plaintif-plaintif telah mencalonkan Amanah ARSM sebagai calonnya yang tidak disetujui oleh ARB dan kumpulannya. ARB tidak bersetuju untuk ARSM menjadi calon kepada kontrak perjanjian US kerana ARSM bukan satu entiti yang sah dan tidak boleh menjadi pihak kepada perjanjian US dan juga bukan pihak kepada penghakiman persetujuan. Dua tahun selepas penghakiman persetujuan direkodkan, kumpulan plaintif-plaintif yang sama telah memfailkan Guaman 650 terhadap ARB, ARC dan ARD menuntut, antara lain, pelaksanaan spesifik perjanjian US dan perisytiharan bahawa defendan-defendan telah bertindak melanggar amanah. Defendan-defendan menuntut balas dalam Guaman 650 dengan tuntutan, antara lain, untuk dilepaskan daripada apa-apa obligasi untuk memasuki perjanjian US dan untuk perintah bahawa ARD dibayar balik daripada balasan belian kedua-dua bidang tanah tersebut. Seterusnya, ARC memfailkan Guaman 1471 terhadap Abdul Razak untuk bayaran balik kemudahan pinjaman dan juga Kamil Azman untuk bayaran balik pinjaman bersama-sama dengan jaminan pinjaman kepada Abdul Razak. Guaman 1471 didengar bersama-sama Guaman 650 di Mahkamah Tinggi. Dalam Guaman 650, tuntutan plaintif-plaintif ditolak dan dua item tuntutan balas oleh defendan-defendan dibenarkan. Bayaran balik balasan belian juga dibenarkan. Perayu-perayu merayu ke Mahkamah Rayuan terhadap keputusan ini. Tuntutan ARC untuk bayaran balik pinjaman-pinjaman dalam Guaman 1471 dibenarkan oleh Mahkamah Tinggi, di mana Abdul Razak dan Kamil Azman diperintahkan untuk membayar balik jumlah pinjaman kepada ARC bersama-sama faedah. Plaintif-plaintif merayu terhadap keputusan ini dalam Rayuan 541. Selepas mendengar kedua-dua rayuan itu, Mahkamah Rayuan mengesahkan keputusan-keputusan Mahkamah Tinggi dalam Guaman 650 dan Guaman 1471. Perayu-perayu dalam rayuan ini adalah Kamil Azman, Kalsombi dan Excel Beat sementara responden-responden adalah ARB, ARD dan ARC. Pada permohonan kebenaran di hadapan mahkamah ini, perayu-perayu mencadangkan penentuan persoalan-persoalan ini (i) apabila satu

penghakiman persetujuan terdiri daripada kewajipan-kewajipan dan perjanjian-perjanjian sesama, adakah mahkamah berhak untuk melepaskan satu pihak dari obligasinya tanpa melepaskan pihak yang lain; (ii) sama ada mahkamah boleh secara efektif mengetepikan atau membatalkan sebahagian perintah persetujuan yang sah dalam ketiadaan dakwaan-dakwaan penipuan, salah nyataan, pemaksaan atau pengaruh tak wajar; dan (iii) apabila hartanah dibeli oleh satu pihak untuk satu matlamat usaha sama dengan pihak kedua, dan usaha sama itu tidak menjadi kenyataan, adakah hartanah yang dibeli itu dipegang dalam amanah konstruktif untuk kedua-dua pihak.

Diputuskan (menolak rayuan-rayuan dengan kos)
Oleh Rohana Yusuf HMP menyampaikan penghakiman mahkamah:

(1) Melalui penghakiman persetujuan, dipersetujui bahawa bayaran balik pinjaman akan dilanjutkan dari tarikh asal. Penghakiman itu juga membuat peruntukan untuk jumlah yang mungkin tertunggak. Penghakiman persetujuan tidak menyatakan bayaran balik pinjaman akan dibuat daripada hasil usaha sama. Tiada apa-apa klausa yang boleh ditafsirkan sebagai menyatakan bahawa pelaksanaan satu syarat (seperti bayaran balik pinjaman) tertakluk pada pra-syarat bahawa perjanjian US harus terlebih dahulu dilaksanakan. Klausa-klausa dalam penghakiman persetujuan tidak bergantung pada satu sama lain. Mahkamah ini tidak boleh mempertimbangkan bahawa pelaksanaan klausa-klausa dalam penghakiman persetujuan menggambarkan satu susunan pelaksanaan untuk mahkamah menggunakan dan memakai s. 53 atau mengambil dahuluan pertimbangan akal seperti yang dibayangkan oleh s. 55 Akta Kontrak 1950.

(2) Pinjaman-pinjaman yang diberikan kepada kedua-dua Abdul Razak dan Kamil Azman dan dokumen-dokumen pinjaman mendedahkan bahawa mereka diberikan pinjaman itu secara individu. Tiada sebab untuk menyimpulkan bahawa bayaran pinjaman bergantung pada kesimpulan perjanjian US. Kamil Azman telah memberikan jaminan peribadinya kepada ARC terhadap segala jumlah-jumlah yang dihutang oleh Abdul Razak melalui perjanjian jaminan, dan dia telah secara betul diputuskan bertanggungjawab untuk tuntutan responden-responden. Oleh itu, hujahan perayu-perayu bahawa obligasi-obligasi kedua-dua peminjam Abdul Razak dan Kamil Azman untuk membayar ARC bergantung pada pelaksanaan apa-apa obligasi oleh ARC menurut penghakiman persetujuan, tiada merit. Tiada prasyarat pada pembayaran balik jumlah-jumlah pinjaman. Kedua-dua Mahkamah Rayuan dan Mahkamah Tinggi telah mencapai kesimpulan yang betul bahawa bayaran balik pinjaman-pinjaman tidak bersyarat atas pihak-pihak memasuki perjanjian US.

(3) Tarikh akhir yang dipersetujui untuk perjanjian US dimuktamadkan adalah pada 1 Ogos 2010. Perayu-perayu telah mengheret perbincangan dan kesimpulan perjanjian dan mendesak supaya Amanah ARSM dijadikan sebagai calon mereka walaupun terdapat bantahan daripada ARB. Pada 8 Jun 2011, segala perbincangan tamat, menjurus pada pemfailan Guaman 650 oleh perayu-perayu. Perayu-perayu dengan jelas malas dan enggan memasuki perjanjian US yang membentuk dasar Mahkamah Tinggi membenarkan perisytiharan yang dituntut ARD. Mahkamah Tinggi betul dalam melepaskan ARD daripada melaksanakan kl. 9 penghakiman persetujuan tetapi perintah sebegitu tidak berjumlah pada perintah pengetepian atau satu variasi bahagian penghakiman persetujuan itu. Perisytiharan yang diberikan sejajar dengan prinsip undang-undang matan bahawa apabila satu pihak enggan melaksanakan perjanjian, pihak yang lain boleh menganggap dirinya sebagai dilepaskan. Mahkamah Tinggi oleh itu tidak mengetepikan kl. 9 atau mengubahkannya tetapi mengisytiharkan bahawa obligasi responden-responden bawah klausa itu dilepaskan atas alasan-alasan munasabah.

(4) ARD telah mengakui membeli tanah-tanah itu pada harga pasaran dan oleh itu menuntut untuk bayaran balik balasan belian, sekiranya mahkamah mendapati bahawa aktiviti-aktiviti komersial yang dijalani oleh kumpulan syarikat responden-responden *ultra vires* Akta Perbadanan Amanah Raya 1995 seperti yang didakwa. Isu *ultra vires* walau bagaimanapun tidak diteruskan oleh perayu-perayu di Mahkamah Rayuan. Perintah meterai menyatakan bahawa tuntutan balas untuk bayaran balik balasan belian tanah yang dibayar oleh ARD dibenarkan, dan plaintif-plaintif diperintahkan membayar balik kepada ARD bersama-sama dengan faedah. Dalam keadaan sedemikian, perintah meterai harus diberikan pertimbangan. Berikutan ini, Mahkamah Tinggi membenarkan tuntutan balas responden-responden untuk bayaran balik, dan perayu-perayu diperintahkan untuk membayar balik balasan belian tanah dengan faedah. Walaupun memerintahkan bayaran balik balasan belian tanah, PK telah gagal membuat perintah lanjutan, untuk tanah-tanah itu dikembalikan kepada perayu-perayu. Oleh itu, kegagalan ini mewajarkan campur tangan rayuan. Daripada meneruskan dengan hujahan pemakaian prinsip-prinsip amanah konstruktif, apa yang sepatutnya dituntut perayu-perayu adalah untuk perintah lanjutan tersebut dibuat. Oleh itu, hujahan amanah konstruktif tidak relevan.

Case(s) referred to:

Asia Pacific Parcel Tankers Pte Ltd v. The Owners Of The Ship Or Vessel 'Normar Splendour' [1999] 7 CLJ 213 HC ***(refd)***

Cobbe v. Yeoman's Row Management Ltd [2008] 1 WLR 36 1752 ***(refd)***

Dial Kaur Tara Singh v. Mann Foong Realty Sdn Bhd [2000] 4 CLJ 93 CA ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(foll)***

Lim Kim Swee v. Tan Meng San [1960] 1 LNS 62 HC ***(refd)***

Mars Equity Sdn Bhd v. Tis 'Ata'ashar Sdn Bhd [2005] 1 CLJ 513 CA ***(refd)***
Pallant v. Morgan [1953] Ch 43 ***(refd)***
Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] 1 LNS 143 FC ***(refd)***
Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd [2018] 6 CLJ 271 FC ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
Stavers v. Curling [1836] 132 ER 447 ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tan Geok Lan v. La Kuan [2004] 2 CLJ 301 FC ***(refd)***
Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 53, 55
Rules of the Federal Court 1995, r. 57(1)
Rules of Court 2012, O. 20 r. 11
Specific Relief Act 1950, s. 41

Other source(s) referred to:
Pollock & Mulla The Indian Contract and Specific Relief Acts, 14th edn, LexisNexis 2013, vol 1, p 842

For the appellants - Ambiga Sreenevasan & Michael Chow; M/s Michael Chow
For the respondents - Cecil Abraham, Rishwant Singh & Daniel Chua; M/s Cecil Abraham & Partners

[Editor's note: For the Court of Appeal judgment, please see Abdul Razak Sheikh Mahmood & Ors v. Amanah Raya Bhd & Ors And Another Appeal [2018] 5 CLJ 273 (affirmed). For the High Court judgment, please see [2015] 1 LNS 508 (varied).]

Reported by Suhainah Wahiduddin

JUDGMENT

Rohana Yusuf FCJ:

Introduction

[1] The appeal before us emanates from two appeals before the Court of Appeal involving three suits filed at the High Court. The first was Suit No: 22NCC-375-2009 (Suit 375) between the plaintiffs (Abdul Razak bin Sheikh Mahmood, Kamil Azman bin Abd Razak, Kalsombi binti V.K. Majid and Excel Beat Sdn Bhd) and the defendants (Amanah Raya Berhad, Amanah Raya Capital Sdn Bhd and Amanah Raya Investment Management Sdn Bhd). Parties had agreed to settle their disputes in Suit 375 which culminated in consent judgment recorded on 28 July 2010.

[2] The same plaintiffs then filed Suit No: 22NCC-650-04-2012 (Suit 650) against the same defendants for alleged breaches of the consent judgment. The defendants counterclaimed for a declaration to be released from any obligation to enter into a joint venture agreement (JV agreement) pursuant to the consent judgment, and for the refund of purchase consideration made to the plaintiffs for two pieces of land. The claim of the plaintiffs was dismissed

and the counterclaim was allowed by the High Court. The plaintiffs lodged an appeal in Appeal No: W-02(NCC)(W)-547-04-2015 (Appeal 547) against the decision in Suit 650, at the Court of Appeal.

[3] Amanah Raya Capital Sdn Bhd (ARC) had also filed Suit No: 22NCC-1471-10-2012 (Suit 1471) against Abdul Razak bin Sheikh Mahmood (Abdul Razak) and Kamil Azman bin Abdul Razak (Kamil Azman) for payment of the loan facilities granted to them. Suit 1471 and Suit 650 were heard together. The High Court had allowed the claim of ARC in Suit 1471 against Abdul Razak and Kamil Azman for the repayment of the loans. Abdul Razak and Kamil Azman had lodged an appeal at the Court of Appeal in Appeal No: W-02(NCC)(W)-541-04-2015 (Appeal 541).

[4] Both appeals 547 and 541 were heard together before the Court of Appeal. In both appeals, the decisions of the High Court in Suit 650 and Suit 1471 were affirmed by the Court of Appeal. Before us, the appeal was lodged by the plaintiffs as appellants who had obtained leave on three questions of law.

The Background Facts

[5] By way of background, pursuant to a trust deed dated 13 October 2006, Abdul Razak (now deceased) created the ARSM Trust and appointed Amanah Raya Berhad (ARB) as its trustee.

[6] About one year later on 19 October 2007 and 17 September 2007 respectively, Amanah Raya Capital Sdn Bhd (ARC) granted a loan of RM5,000,000 each, individually to Abdul Razak and Kamil Azman pursuant to two sets of agreement known as Moneylending Agreement (Secured Loan). Amongst the securities provided for the loan was the Guarantee Agreement executed by Kamil Azman, to personally guarantee on demand against all sums of money owed by Abdul Razak to ARC.

[7] It was later agreed between Abdul Razak, Kamil Azman and ARB in the year 2008 that greater profits would be obtained by way of development of one of the trust properties held under H.S. (D) 406, PT No. 287B, Section 41 Bandar Kuala Lumpur (PT 287B). For that purpose, an adjoining land held under H.S. (D) 95437, Lot No.1396A (Lot 1396A) was acquired by the plaintiffs through Excel Beat Sdn Bhd (Excel Beat) with a view of undertaking a joint venture development. Both PT 287B and Lot No.1396A were then sold to Amanah Raya Development Sdn Bhd (ARD) at a price consideration of RM2,895,000 and RM2,905,000 respectively.

[8] In October 2009 Abdul Razak, Kamil Azman, Kalsombi, and Excel Beat, sued ARB, ARC, Amanah Raya Investment Management Sdn Bhd (ARIM), and ARD in Suit 375, for breach of trust and or fiduciary duties on their part including various breaches of duties by ARB as trustee. Pursuant to Suit 375 the plaintiffs were seeking for a declaration that ARB was in breach of trust and mismanaging the ARSM Trust.

[9] A consent judgment was recorded on 28 July 2010 between ARB, ARD, ARC, ARIM with Abd Razak, Kamil Azman, Kalsombi, and Excel Beat over Suit 375. The content of the consent judgment as found at pp. 84 to 86 of the common core bundle (jilid 1) is reproduced below *in extenso* for better appreciation of its application:

1. The Loan Facilities granted by the 2nd Defendant to the 1st and 2nd Plaintiffs on 23.10.2007 and 17.09.2007 respectively shall be extended for a period of 24 months commencing 28.7.2010.

2. The 2nd Defendant agrees that the payment of the monthly interest payable for the 1st and 2nd Plaintiffs' respective Loan Facilities shall be deferred for a period of 24 months commencing 28.7.2010.

3. The 1st and 2nd Plaintiffs agree that on the maturity date, which the parties agree to be on 27.7.2012, the following sums shall be payable to the 2nd Defendant:

   3.1 the 1st Plaintiff shall pay the 2nd Defendant the sum of RM4,226,783.05; and

   3.2 the 2nd Plaintiff shall pay the 2nd Defendant the sum of RM5,339,184.85.

4. In the event that the above payments are not paid by the 1st Plaintiff and/or the 2nd Plaintiff on 27.7.2012 as stipulated, a default interest at the rate of 8% p.a., calculated on a daily basis, will be charged on the total amount due and remaining unpaid or any part thereof, from the date the monies are due until the payment date.

5. In the event that only part payment(s) of the amount(s) payable are made by the 1st Plaintiff and/or the 2nd Plaintiff on 27.7.2012, and subject only to the condition that the amount remaining outstanding as at 27.7.2012 from the 1st Plaintiff and the 2nd Plaintiff does not exceed RM2,000,000.00, the parties shall within 3 months from 27.7.2012 (unless mutually extended by the parties) **enter into negotiations to restructure their respective Loan Facilities which shall take into account the 1st Plaintiff's twenty-five percent (25%) interests in the Joint-Venture Agreement** referred to in paragraph 9 hereinbelow and the assignment of the said interest to the 2nd Defendant toward the repayment of the outstanding sums under the Loan Facilities.

6. Pending the finalisation of the restructuring of the Loan Facilities, the 2nd Defendant undertakes not to act on the securities furnished under the Loan Facilities. For the avoidance of doubt, the 2nd Defendant shall be entitled to act on the securities in the event that the 1st Plaintiff and/or the 2nd Plaintiff default(s) in their obligations under the terms of the restructured facilities and/or under the terms herein.

7. The 1st and 2nd Plaintiffs shall, within 14 days hereof, write to all the Defendants hereinabove and to the Ministry of Finance, in form and substance as pre-agreed between the parties, withdrawing the 1st and 2nd Plaintiffs' complaints in its entirety.

A

8. The 1st and 2nd Plaintiffs hereby agree to the withdrawal of their respective deposits in the Safecare Trust Fund Account maintained with the 1st Defendant of RM56,326.99 each. The deposits shall be paid over to the 2nd Defendant to reduce the 1st and 2nd Plaintiffs' Loan Facilities to RM3,913,688.01 and RM4,943,689.68 respectively, calculated at 28.7.2010.

B

9. The 1st Plaintiff and/or the 2nd Plaintiff and/or their nominated entity shall enter into a Joint Venture Agreement, in form and substance as pre-agreed between the parties, with the 4th Defendant and/or their nominated entity on/before 11.8.2010.

C

10. The parties agree that they shall have no further claims against each other and undertake not to raise the allegations raised in this action in the future. (emphasis added)

(The first plaintiff referred to in the consent judgment is Abdul Razak, the second plaintiff is Kamil Azman, the second defendant is ARC and the fourth defendant is ARD.)

D

[10] The consent judgment, from our reading of it, deals with three main subject matters. Firstly, on the loan facilities. It was agreed by ARC that the period of loan granted to Abdul Razak and Kamil Azman would be extended, and the mode of repayment are spelled out in the various clauses. On the JV agreement, it was agreed that a JV agreement is to be entered into between Abdul Razak and Kamil Azman or their nominees, with ARD or its nominees. Finally, parties agreed not to have further claims or raise the same allegations in the future, against each other.

E

[11] Nothing materialised from the consent judgment. Despite countless discussions, the terms of the JV agreement could not be performed. The main dispute centred on the issue that the plaintiffs had nominated ARSM Trust as their nominee which was not agreed upon by ARB and its group. ARB could not agree to have ARSM as a nominee to contract the JV agreement because ARSM is not a legal entity and cannot be a party to the JV agreement, and it also was not a party to the consent judgment.

F

G

[12] In the meantime, ARC had caused various demands to be made against Abdul Razak and Kamil Azman to pay up the loans. The demands were not adhered to. Hence the loan repayment too remained outstanding.

H

[13] About almost two years after the consent judgment was recorded, the same group of plaintiffs, Abdul Razak and Kamil Azman together with Kalsombi and Excel Beat filed Suit 650 at the Kuala Lumpur High Court, against ARB, ARC and ARD on 28 April 2012 seeking *inter alia* for:

I

(a) specific performance of the JV agreement pursuant to the consent judgment dated 28 July 2010;

(b) several declarations, including a declaration that the defendants acted in breach of trust; and

(c) alternative prayers for restitution and an order to set aside the consent judgment.

[14] The defendants counterclaimed in the same Suit 650, seeking for two main prayers. First for a declaration that they, and in particular ARD, be released from any obligation to enter into the JV agreement. The second prayer is for an order that ARD be refunded with the purchase consideration of the two pieces of land in the sums of RM2,895,000 and RM2,905,000, together with interest.

[15] About five months after Suit 650 was filed, ARC on 1 October 2012 filed Suit 1471 against Abdul Razak for the repayment of the loan facilities in the sum of RM4,259,207.69 as well as Kamil Azman for loan repayment of RM5,380,142.98 together with the guaranteed loan to Abdul Razak in the sum of RM4,259,207.69 with interest at the prescribed rate, pursuant to the loan agreements.

[16] Suit 1471 was heard together with Suit 650 at the High Court. In Suit 650 the claim of the plaintiffs was dismissed and the two items of the counterclaim by the defendants were allowed. Thus the counterclaim for an order that ARD be released from the obligation to conclude the JV agreement was allowed. The refund of purchase consideration of RM2,895,000 and RM2,905,000 was also allowed. There is however, a clear discrepancy in the order of the High Court with that of the grounds of judgment of the learned Judicial Commissioner (JC) on the counterclaim for the refund of the purchase consideration. The fair order states that the counterclaim for the refund of purchase consideration paid by ARD was allowed, and the plaintiffs were ordered to refund ARD with the same together with interest thereon. In the grounds of judgment, the learned JC at para. [57] dismissed this counterclaim. The plaintiffs appealed to the Court Appeal of this decision, in Appeal 547.

[17] The claim of ARC for the repayment of the loans in Suit 1471 was allowed by the High Court, where Abdul Razak and Kamil Azman was ordered to repay the loan amount to ARC together with interest. The plaintiffs appealed on this decision in Appeal 541.

[18] After hearing both appeals together, the Court Appeal affirmed the decisions of the High Court in both Suit 650 and Suit 1471. The appellants in the appeal before us are Kamil Zaman, Kalsombi, and Excel Beat and the respondents are ARB, ARD, and ARC.

[19] We note in particular that during the proceedings at the Court of Appeal, the respondents' counsel objected to the submissions made by the appellants on the issues of unjust enrichment, constructive trust and mutual promises. The objection was raised on the basis that these issues were not raised in the court below or in the pleadings. The objection was sustained by the Court of Appeal, except for the issue on mutual promises.

[20] At the leave application before this court, the appellants proposed five questions to be determined. This court however on 20 November 2017 granted leave to the appellants only for the three following questions to be answered:

A (i) Where a consent order consists of mutual obligations and promises, is the court entitled to release one party of its obligation without releasing the other party?

(ii) Whether a court may effectively set aside or nullify a part of a valid consent order particularly in the absence of allegations or findings of
B fraud, misrepresentation, coercion or undue influence.

(iii) Where property is purchased by one party (A) for the sole purpose of a joint venture with a second party (B) and the joint venture does not materialise, is the property so purchased held in constructive trust for
C both parties?

Consent Judgment And Mutual Promises

[21] We agree with the proposal by learned counsel for the respondents that both questions 1 and 2 are inter-related. We will thus discuss both these questions together in these grounds of judgment, bearing in mind that both
D of these questions begged the determination of the underlying issue as to whether the consent judgment constitutes mutual promises which are dependent on each other.

[22] Before us, the appellants raised various issues to contend that the Court of Appeal, in affirming the decision of the High Court, had erred in
E the following areas:

(i) in releasing the respondents of their obligations under the consent judgment without releasing the appellants as well;

(ii) in failing to consider that the consent judgment consisted of mutual
F promises which were dependent upon each other; and

(iii) in setting aside a part of the consent judgment without any allegations or findings of fraud, misrepresentation, coercion or undue influence.

[23] The bone of contention as canvassed by learned counsel for the
G appellants is that the consent judgment constitutes mutual promises and obligations which are dependent on each other, hence the performance of one need not be done before the fulfilment of the other. Following that it was contended that entering into the JV agreement and the repayment of loan facilities are mutual promises which form the consideration to the consent
H judgment making the performance of one promise a condition precedent to the performance of the other. It was then submitted that the order of performance of the obligations in the consent judgment must adhere to s. 53 of the Contracts Act 1950. By virtue of s. 53, it was asserted that Abdul Razak and Kamil Azman were under no obligation to repay the loan until the JV agreement concludes. By reason of the failure to form the JV
I agreement, the appellants stood firm that, the obligation to repay the loan had not arisen, applying s. 55 of the Contracts Act.

[24] In contending and construing that the consent judgment is indeed in the nature of mutual promises, learned counsel urged upon us to give due regards to the two following matters;

(i) that the parties agreed in the consent judgment for the loan repayment to be extended for 24 months where the maturity date fell on 27 July 2012, and the joint venture was supposed to be signed by parties on 11 August 2010 much ahead of the maturity date;

(ii) Clause 5 provides to the effect that in the event that by the maturity date of 27 July 2012 the loan remained outstanding but not exceeding RM2,000,000, the parties may negotiate to restructure the facilities and shall take into account the 25% interest of Abdul Razak in the JV agreement and the assignment of that interest to Kamal Azman towards repayment of the outstanding sum.

[25] Learned counsel then impressed upon us to infer therefrom that the consent judgment is one where there are reciprocal promises to be performed and that the performance of the promise by one party could not be claimed by the other until the other party's promise had been satisfied. And it is for this reason it was submitted, ss. 53 and 55 of the Contracts Act come into play. Various authorities were cited in support of that proposition.

[26] In response, the respondents assailed the basic thrust and the core contention of the appellants' case on this particular issue, by highlighting that the consent judgment does not constitute mutual obligations and promises which are dependent on each other. According to the respondents, the High Court and the Court of Appeal had merely treated the obligations of the respondents discharged upon considering all the facts and circumstances leading to the non-performance of the obligation under the consent judgment.

[27] On these rival contentions, it became apparent to us that the very basic issue in dispute that needs to be resolved is whether or not the consent judgment may be construed as consisting of mutual promises that depend on each other in terms of the performance of the obligations contained therein. The only way to resolve it is by giving the consent judgment its proper construction. These issues too involved finding of facts and law and have been given interpretation by both the courts below.

[28] In this regard, we are mindful that this court in *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301; [2004] 3 MLJ 465, had ruled that a consent order is akin to a contract with superadded command of the court. Thus, it must be given its full contractual effect. It is to be interpreted in the same manner as the court would a contract. The canons of interpretation are as familiar as any canons of construction would be to a legal practitioner. The paramount consideration is to ascertain the intention of the parties to the consent judgment. Such intention is to be objectively assessed by the court, in particular by reviewing the language employed in the consent judgment.

[29] To recapitulate, the appellants chose to characterise the consent judgment as having mutual obligations and promises on two main reasons that we have alluded to, in para. [24] *viz*; that the parties agreed to extend the loan repayment for 24 months to 27 July 2012 which was a date after the agreed date for the signing of the JV agreement of 11 August 2010 and secondly as per what is stated under cl. 5 of the consent judgment. There is no doubt that the JV agreement was to be concluded much ahead of the maturity date of the loan. It is also true that cl. 5 says in the event the loan which remained outstanding did not exceed RM2,000,000 by the maturity date of 27 July 2012, the parties may negotiate for the restructuring of the facilities. And in doing so, it was also provided that the 25% interest of Abdul Razak in the JV agreement, as well as the assignment of that interest to Kamil Azman towards repayment of the outstanding sum, must be taken into account. Now, how are these clauses of consent judgment dependent on each other.

[30] We are not able to appreciate the line of argument put forth, to enable a legal construction and to classify the consent judgment as suggested by the appellants. From its clear wordings, the consent judgment does not say that the repayment of loans would be made from the proceeds of the joint venture. The way we understand it, by the consent judgment it was agreed that the loan repayment would be extended from its original due date. It also provides for the eventuality of payment remaining outstanding. In that event, the parties contemplate negotiation for restructuring.

[31] We are constrained to find ourselves in complete agreement with the respondents' counsel that there is nothing from all these clauses that can be construed to say that the performance of one condition (such as repayment of loan) may be subject to a pre-condition that the JV agreement must first be in place. Just because parties agreed that the repayment be extended for 24 months where the maturity date fell on 27 July 2012, and the JV agreement was supposed to be signed by parties on 11 August 2010 much ahead of the maturity date and the fact that if payment remained outstanding there is agreement to negotiate for restructuring, do not make the clauses in the consent judgment dependent on each other.

[32] In the circumstances, we are not able to appreciate that the performance of the clauses in the consent judgment depicts a particular order of performance so as to enable us to invoke and apply s. 53 or to employ the common sense order of precedence as envisaged by s. 55 of the Contracts Act.

[33] We agree with the respondents that, it is amply clear that there is no precondition to the repayment of the loan sums. Looking at the surrounding background too, the fact was the loans were granted to both Abdul Razak and Kamil Azman on 17 September 2007 and 19 October 2007 respectively and the loan documents disclose that they were granted individually to each of them. There is no reason to conclude that the loan payment was dependent on the conclusion of the JV agreement. Kamil Azman had given his personal

guarantee to ARC against all the sums owed by Abdul Razak by way of a guarantee agreement, and he is correctly held to be liable to the claim of the respondents. Furthermore, there was no evidence adduced, as found by the learned JC, to support the proposition that the obligation of Abdul Razak and Kamil Azman to pay the sums due under the loans is conditional upon the performance of the obligations under the joint venture.

[34] Hence the contention of the appellants that the obligations of the two borrowers Abdul Razak and Kamil Azman to pay ARC is contingent upon the performance of any obligation by ARC pursuant to the consent judgment, in particular the JV agreement, is bereft of any merit. They both as borrowers in fact agreed to personally pay back the loan facilities granted by the maturity date of 27 July 2012 as clearly stated in cl. 3 of the consent judgment.

[35] We will echo the observation of the Court of Appeal where in the same tone at para. [31] it was observed that;

> 31. The terms of the Consent Judgment do not contain words which state that the repayment of the loan amount by the Appellants are to be sourced from the proceeds of the joint venture. We must not lose sight that respective parties were represented by legal advisers and if that had been the intention of the parties, such wordings would have been easily inserted in the Consent Judgment. Without such clear words, the Court cannot infer meanings as put forth by the Appellants.

We agree with the Court of Appeal and we too have difficulty in discerning anything from the consent judgment which even remotely suggests that the repayment of the loan is conditional upon the conclusion of the JV agreement.

[36] Learned counsel for the appellants cited s. 53 of the Contracts Act that deals with order of performance of obligations in a contract. We note the clear order of performance as envisaged by s. 53. Nothing in the consent judgment allows us to infer that any such order had been stipulated. What it says on the loan repayment is that the obligations to pay up the loans had been extended, and what it also provides for is the eventuality of the repayment remaining outstanding by the maturity date. There is nothing to suggest that the JV agreement must be in place before the loan is repaid.

[37] The case cited by learned counsel, *Lim Kim Swee v. Tan Meng San* [1960] 1 LNS 62; [1960] 1 MLJ 262, which applied s. 53 is of no assistance to the appellants' case here. In that case, it was found by the court that the obligation to discharge the debt to one called Celho must first take place before the defendant was put in the position to transfer the land in question. Thus, before the debt to Celho was discharged and as agreed, the obligation to transfer the land by the defendant did not arise. Though the agreement did not spell out the order of performance of the parties' obligation, the court applied s. 53 to rule that payment of loan was a pre-condition to the transfer of the land.

[38] The decision of the Court of Appeal in *Mars Equity Sdn Bhd v. Tis Ata'ashar Sdn Bhd* [2005] 1 CLJ 513; [2006] 4 MLJ 302 was cited to us by the appellants' counsel, to support the contention that both Abdul Razak and Kamal Azman were under no obligation to pay the loan before the JV agreement was signed. Again, this case is no authority to the appellants' contention. This case dealt with two contemporaneous agreements which formed the basis of agreement between parties, one to transfer the land from the respondent to the appellant, and the other was an agreement for the appellant to fell timber pursuant to the timber agreement. The Court of Appeal held that both documents executed contemporaneously formed one transaction, and must be read together. Hence, since the two documents read together did not fix the order of performance of each party's obligations, the court must look into the nature of transaction to determine that order. Section 55 of the Contracts Act was applied by the court, to rule that the respondent in that case was in breach of the duty to transfer the land to the appellant. It was held that the respondent was in no position to call for the performance of applying for licence under the timber agreement, before the transfer took place.

[39] We find it clear that the principles enunciated in the authorities cited are not applicable to the background of the instant appeal. The factual matrix here do not call for the application of s. 53 and s. 55 of the Contracts Act. We agree with principle relied upon by learned counsel for the appellants as enunciated in *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1; [1989] 1 MLJ 457: whether or not the promise of one party is conditional upon and precedent to the other's liability depends on the construction of the contract taken as a whole and the intention of parties, upon the surrounding circumstances. It was quoted in that case, the decision in an old English case of *Stavers v. Curling* [1836] 132, ER 447, which propounded the principle that, besides looking at the documents and intention of parties, the application of common sense to each particular case, must not be precluded. Such is the principle incorporated into s. 55 of the Contracts Act.

[40] The case of *Dial Kaur Tara Singh v. Mann Foong Realty Sdn Bhd* [2000] 4 CLJ 93; [2000] 3 MLJ 153 is a Court of Appeal decision which dealt with an agreement culminated from a letter exchanged between solicitors. The obligation of the defendant was to execute transfers of eight titles to the plaintiff. Then it spells out the obligation of the plaintiff to settle an amount due to the bank to redeem the eight titles of the plaintiff plus 23 titles of the defendant. The agreement did not provide an order of performance of the obligations. It was found by the court that the agreement contained reciprocal promises of parties such that the performance of the promise by one party could not be claimed by the other, till the other party's own promise had been performed. Thus it was held, applying s. 55 of the Contracts Act, that the plaintiff could not make a claim for the transfer of the titles, before performing the obligation to pay up the bank to redeem the titles.

[41] We further agree with the respondents' submissions that the consent judgment must be construed as a commercial instrument. The aim is to ascertain the contextual meaning of the relevant contractual language. It must be done objectively as to what a reasonable person, circumstanced as the actual parties in a commercial environment were, would have understood it to mean. This must be gathered from the language used and its relevant contextual sense (see *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177). Applying all the required principles of construction, in our view, both the Court of Appeal and the High Court had arrived at the correct conclusions that the repayment of loans is not conditional upon the parties entering into the JV agreement.

[42] The appellants in characterising the consent judgment as they did, to avail themselves of s. 55, are therefore misplaced. We are further reinforced in our view, by referring to *Pollock & Mulla The Indian Contract and Specific Relief Acts*, vol 1 (updated 14th edn, LexisNexis 2013) where learned author at p. 842 observes that:

> Section [55] applies when the promises are reciprocal and dependent. It does not apply to 'entire contracts', where the performance of one promise is completely independent of the performance of the other.

[43] The appellants had also raised an argument on the distinction between contracts in which obligations are entire and divisible. Again, this argument would only serve as an academic information and is of no application to the consent judgment here, in view of our finding.

Whether The Consent Judgment Is Varied Or Set Aside

[44] The next complaint of the appellants was that the court below, in releasing the obligation of the ARD from entering into the JV agreement with the appellants, had erroneously done so. Learned counsel held the view that this part of the order is in effect setting aside cl. 9 of the consent judgment. It is therefore erroneous in law, since a valid consent order may only be set aside on specific grounds of fraud, misrepresentation, coercion, and undue influence. None of these, it was said, had been alleged or presented in the instant appeal to warrant the setting aside or variation of the consent judgment by the High Court. Further to that, it was also contended that the release of one party and not the other from the consent judgment is completely wrong in law.

[45] Responding to the submissions, learned counsel for the respondents controverted the basic premise of the case of the appellants that the order of the High Court in releasing ARD from cl. 9 of the consent judgment amounts to a variation or a setting aside of the consent judgment, or part of it. Learned respondents' counsel elucidated the point that the prayer of the respondents in its counterclaim merely sought for a declaration by the court for ARD to be released of its obligation to enter the JV agreement but never seeking for that relevant clause to be set aside. The difference being that, a declaratory

order merely pronounces the legal state of affairs. This differs from a coercive judgment. A coercive judgment is enforceable by the court but not a declaratory order.

[46] Citing in support of the above proposition is the decision in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] 1 LNS 143; [1979] 1 MLJ 135 where it was observed that all a declaratory order does is to declare the rights of parties. The distinction is well explained by Zamir and Woolf in "*The Declaratory Judgment*" (Sweet & Maxwell 2011). In *Asia Pacific Parcel Tankers Pte Ltd v. The Owners Of The Ship Or Vessel 'Normar Splendour'* [1999] 7 CLJ 213; [1999] 6 MLJ 652, this legal position was reiterated. Declaratory judgment is also discretionary in nature as specified under s. 41 of the Specific Relief Act 1950, and as expounded in *Tan Sri Haji Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177.

[47] We pause to examine the nature of the order made by the High Court in this regard. We observe that the respondents did seek for a declaration for the respondents, in particular ARD, to be released from performing its obligation under cl. 9 of the consent judgment. The learned JC was fully aware that the validity and sanctity of the consent judgment is to be observed. Repeatedly in the judgment, His Lordship remarked that the consent judgment could not be set aside despite being sought by the appellants themselves in Suit 650. It is pertinent to note, the prayer of the appellants to impugn the consent judgment was dismissed as the learned JC found no fraud, undue influence, coercion or the likes was pleaded or established as its basis. As held by the learned JC, it was merely premised on an allegation that the respondents had no intention to honour the terms of the same. However, if we were to look at the reasons offered by the respondents in the prayer seeking for a declaration for the release of ARD, we note that it was based on a multitude of reasons both factual and legal.

[48] In our observation, the reasons which led to the order to release ARD, made by the High Court appeared to be for the following. The deadline agreed for the JV agreement to be finalised, was 1 August 2010. Discussions commenced between parties with the draft agreement circulated for comments. The appellants were dragging the discussions and the conclusion of the agreement, and insisted in nominating ARSM Trust as their nominee despite objections by ARB on the basis that ARSM is not a legal entity and not a party to the JV agreement nor the consent judgment. A couple of extensions of time were granted by the respondents at the request of the appellants to conclude the agreement but it came to no avail. Finally, the respondents (ARB) wrote to the appellants giving an *ultimatum* for the JV agreement to be executed by 7 June 2011. The appellants however insisted on nominating ARSM Trust as their nominee. By 8 June 2011 all discussions ceased which led to Suit 650 being filed by the appellants. On all accounts, the appellants were clearly indolent and unwilling to enter into the JV agreement. These formed the basis of the High Court granting the declaration sought by the respondents (ARD).

[49] The High Court was correct to release the respondents (ARD) from performing cl. 9 but such order cannot amount to a setting aside or a variation of that part of the consent judgment. The declaration granted is in accord with the trite legal principle that, where one party refuses to perform an agreement, the counterparty may treat himself as discharged. The High Court therefore did not set aside cl. 9 or vary the same but had simply declared that the respondents' obligation under that clause was discharged on good reasons. Thus we find it clear that the appellants had once again clearly mischaracterised the order made by the High Court which was affirmed by the Court of Appeal, in declaring that the respondents need no longer perform the obligation to enter into the JV agreement. We agree with the respondents that this is also a case of mischaracterising the order made by the High Court. The High Court did not set aside cl. 9 but merely declared that the respondents particularly ARD were released from performing their obligations under cl. 9 of the consent judgment.

[50] Having made our observation in the above analysis, we now re-examine questions 1 and 2 posed. Both these questions presuppose the characterisation that the consent judgment consists of mutual obligations, the performance of which are dependent on each other. This presupposition was very much disputed. Both the courts below had made their findings of facts and law that the appellants indeed had mischaracterised the consent judgment. We are in complete agreement with those findings. That being the position, we are of the view that the first two questions would not determine the outcome of this appeal. We therefore do not find it necessary in the circumstances for these two questions to be answered.

Constructive Trust

[51] In deliberating on leave question 3, learned counsel for the appellants sought to advance an issue on the applicability of the principle of constructive trust over the property purchased by ARD from the appellants for development purposes, which never materialised. Constructive trust it was submitted, attaches by law to specific property which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of it. This court in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 observed that constructive trust is an imposition of law irrespective of the parties' intention. The concept of constructive trustee operates on the basis of whether justice and good conscience demand for its application.

[52] On the factual matrix of the present appeal, it was argued that the trust deed of the ARSM Trust in cl. 12 provides that in deciding to develop or sell any property, the decision must be by a majority and must have regard that the preference is developing the property instead of selling it. The trust property PT 287B and the acquired adjoining Lot 1396A were acquired for consideration by ARD, for the purpose of developing them for sale. This was all within the knowledge of ARB and ARD.

[53] Learned counsel for the appellants proceeded to contend that ARD should not keep these lands despite making payment for the same. It was submitted that it would be a case of an unjust enrichment for ARD to retain these lands as the sole purpose of transfer was for development purpose under the JV agreement and nothing else. Learned counsel contended therefore that ARD is holding the lands as constructive trustee, applying the principle as enunciated in *Pallant v. Morgan* [1953] Ch. 43, and as summarised in *Cobbe v. Yeoman's Row Management Ltd* [2008] 1 WLR 36 1752. According to the appellants, the transfer to ARD in this case, was not an outright sale but with the intention of having the JV agreement in mind and ARD is therefore holding the lands as constructive trustee. And this was said to be consistent with the object of ARSM Trust.

[54] In response the respondents called into question the appellants' right in raising any issue on constructive trust on the basis that;

(i) constructive trust was not the pleaded case of the appellants;

(ii) the Court of Appeal had sustained the preliminary objection raised by the respondents that the appellants be refrained from raising issues of constructive trust, and unjust enrichment but allowed only the point on mutual obligations to be raised;

(iii) that the appellants had failed to *inter alia* state the ground of objection to the decision appealed against and the points of law or fact which are alleged to have been wrongly decided, as required by r. 57(1) of the Rules of the Federal Court 1995, which deals with how a memorandum should be filed.

[55] We have perused the pleaded case of the respondents (ARD) for the refund of the purchase consideration. At para. 10 of the re-amended defence and amended counterclaim, ARD admitted purchasing the lands at market price and thereby sought for the refund of the purchase consideration, in the event the court found that the commercial activities undertaken by the respondents' group of companies *ultra vires* the Public Trust Corporation Act 1995 as alleged. The issue on *ultra vires* was not proceeded with by the appellants at the Court of Appeal.

[56] It must be noted that the amended defence and counterclaim at para. 22 prays for the refund, only in the event the commercial activities undertaken by the respondents are ruled to be *ultra vires.* The learned JC in the grounds of judgment had clearly pronounced that the counterclaim for the refund of the purchase consideration stood dismissed. The fair order on the other hand, states that the prayer for the refund of the purchase consideration is allowed, together with interest as prayed. In the circumstances, the fair order had to be given cognisance.

[57] An order of the High Court which had been sealed will render the High Court *functus officio*, save and except to correct clerical errors under the slip rule. This is the position as stated under O. 20 r. 11 of the Rules of Court 2012. This trite position has been reiterated in the recent decision by this court in *Scott & English (M) Sdn Bhd v. Yung Chen Wood Industries Sdn Bhd* [2018] 6 CLJ 271. The same fair order had also been affirmed by the Court of Appeal where the decision of the High Court was affirmed.

[58] Following the fair order, the High Court had allowed the counterclaim of the respondents for the refund, and the appellants were ordered to refund the purchase consideration with interest, running from the date the amount was paid by ARD to the appellants. Despite ordering refund of the purchase consideration, we note that the learned JC had failed to make a consequential order, for the lands to be returned to the appellants. Thus, this failure invites this court's appellate intervention. Instead of pursuing with the argument on the applicability of the principles of constructive trust, what the appellants ought to have sought for is this consequential order to be made.

[59] We again decline to answer question 3 as we are clear that the submission on constructive trust is of no relevance. We therefore affirm the decision of the Court of Appeal and, in the interest of justice, make a consequential order for the respondents (ARD) to return the lands to the appellants after full price consideration as per the High Court order is made.

[60] On the whole, in our view, the appellants had woven some legal intrigues, bereft of credible facts and legal findings by the courts below, in characterising the consent judgment as they did. That being the case, the argument of the appellants based on the purported characterisation must fail. The Court of Appeal had made a ruling disallowing the issue *inter alia* on constructive trust. The ruling of the Court of Appeal was not protested against, instead the appellants proceeded to submit on the issue of constructive trust, as though such a ruling was never made.

[61] Having deliberated on all the issues raised before us and having reached the conclusions that we did, the appeal of the appellants must fail and be dismissed. We therefore unanimously dismiss the appeal with costs. This is subject to the variation of the order of the High Court as affirmed by the Court of Appeal, for ARD to cause the two pieces of land to be returned to the appellants, upon full refund of purchase consideration as ordered by the High Court.